

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0016-PR
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOHNNY RAY BELL,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042369

Honorable Kenneth Lee, Judge
Honorable Edgar B. Acuña, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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By Joy Athena

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H O W A R D, Presiding Judge.

¶1 Johnny Ray Bell petitions this court for review of the trial court’s denial of his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Bell claims the trial court erred in denying his request to remove a purportedly illegal \$250 fine from his sentence. We grant review but, because the claim is precluded, *see* Rule 32.2, Ariz. R. Crim. P., we deny relief.

¶2 We review the trial court’s ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). After Bell was charged with various offenses, he pled guilty to one count of unlawful possession of a narcotic drug. Pursuant to the plea agreement, the court suspended the imposition of sentence, placed Bell on probation and, *inter alia*, ordered him to pay a \$250 fine to the Pima County Anti-Racketeering Fund. Bell subsequently violated the terms of his probation and, after a hearing, the trial court continued him on probation but placed him on Intensive Probation Supervision (IPS). Bell then filed a petition for post-conviction relief, raising claims of ineffective assistance of counsel and newly discovered evidence. Bell did not raise any claim with respect to the \$250 fine in that petition. While the petition was pending, Bell again violated the terms of his probation and again the court continued him on probation on IPS. Bell then filed a request to dismiss the post-conviction proceeding on the grounds that he believed the IPS probation was in his own best interest and that in light of the revocation proceedings, the claims “appear[ed] to be moot or clouded at best.” The trial court granted Bell’s request and dismissed the post-conviction proceeding “with prejudice.”

¶3 Over approximately the next two years, the trial court found Bell in violation of the terms of his probation two more times. After the last violation hearing, the court revoked probation and sentenced Bell to a 2.5-year prison term. The court also affirmed the \$250 anti-racketeering fine. Bell then filed a second petition for post-conviction relief and alleged the fine was illegal. The trial court addressed the merits of this claim and summarily denied relief.

¶4 Bell did not challenge the fine at the time he entered the plea agreement, when the trial court imposed the fine at his original sentencing, or in his first petition for post-conviction relief. A petitioner is generally precluded from raising a claim in a Rule 32 post-conviction proceeding if that claim was raisable in “any previous collateral proceeding.” Ariz. R. Crim. P. 32.2(a)(3); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 3-6, 23, 203 P.3d 1175, 1176-77, 1180 (2009) (defendant precluded from raising sentencing claim after he entered guilty plea, filed and withdrew notice of post-conviction relief, and then filed second notice of post-conviction relief raising claim). In his petition for review, Bell contends that because the trial court did not find his claim precluded, it would be “inappropriate” for this court to do so. But he cites no authority for this argument and it is waived. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument).

¶5 Furthermore, “[t]hough the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion.” Ariz. R. Crim. P. 32.2(c); *see*

also A.R.S. § 13-4232(C) (same). And the fact that the trial court ruled on the merits does not prevent us from finding a claim precluded. *See Swoopes*, 216 Ariz. 390, ¶ 47, 166 P.3d at 959; *see also State v. Flores*, 218 Ariz. 407, n.14, 188 P.3d 706, 715 n.14 (App. 2008) (trial court affirmed if result “legally correct for any reason”).

¶6 In his petition for post-conviction relief, Bell argued the claim was not precluded for a variety of reasons. But Bell does not present these arguments on review and has therefore waived them. *See Ariz. R. Crim. P. 32.9(c)(1)* (“Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.”).

¶7 Because the claim regarding the \$250 fine was raisable when the court first imposed the fine or when Bell filed his first petition for post-conviction relief, he is precluded from raising this claim and the trial court did not abuse its discretion in denying relief. Therefore, although we grant review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge